

P-3007/NA-89-76 ORDER DENYING REQUEST FOR RELIEF FROM ASSESSMENT
OF REGULATORY COSTS

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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Chair
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In the Matter of the Minnesota
Independent Equal Access
Corporation's Application for a
Certificate of Public
Convenience and Necessity

ISSUE DATE: September 23, 1991

DOCKET NO. P-3007/NA-89-76

ORDER DENYING REQUEST FOR RELIEF
FROM ASSESSMENT OF REGULATORY
COSTS

PROCEDURAL HISTORY

On January 11, 1991, the Minnesota Independent Equal Access Corporation (MIEAC) submitted a letter to the Commission stating its objections to paying the full regulatory costs of the P-3007/NA-89-76 proceeding. In its letter, MIEAC also waived its right to the 60 day time limit under Minn. Stat. § 237.295 (1990) for the Commission to order a contested case hearing. MIEAC indicated that a procedure based on the filing of briefs and reply comments may replace the need for a contested case hearing.

On February 5, 1991, US West Communications, Inc. (USWC) filed a letter in response to MIEAC's objection. USWC provided five reasons to explain why it should not bear any responsibility for the costs of the 89-76 proceeding.

On May 16, 1991, the Commission issued a notice to parties. The notice provided that MIEAC should present its objections and reasons in detail within 30 days. Parties were given 30 days to respond to MIEAC's objections and reasons.

On June 17, 1991, MIEAC filed its brief in support of its objection to the billings of the Minnesota Department of Public Service (the Department).

On July 17, 1991, MCI Communications, Inc. (MCI) and AT&T Telecommunications of the Midwest, Inc. (AT&T) submitted replies to MIEAC's brief.

On July 18, 1991, USWC and the Department submitted their replies to MIEAC's brief. The Department also submitted a request to accept its filing out-of-time. The Department explained that through miscommunication, the original and copies were not filed with the Commission until July 18, one day beyond the 30 days provided for in the Commission's notice.

On July 26, 1991, the Residential Utilities Division of the Office of the Attorney General (RUD-OAG) submitted a letter to the Commission to correct an error in MCI's reply to MIEAC's objections. The RUD-OAG clarified that it does not bill utilities for its costs in regulatory proceedings and has no authority to do so.

On August 27, 1991, the Commission met to consider this matter.

FINDINGS AND CONCLUSIONS

Commission and Department Incurred Substantial Expenses Responding to MIEAC's Application for Authority

On February 7, 1989, the Minnesota Independent Equal Access Corporation (MIEAC) filed an application for a certificate of authority to provide centralized equal access (CEA) services to interexchange carriers (IXCs) on behalf of any independent local exchange carrier (ILEC) which chose to use its services. The Minnesota legislature requires that before awarding a certificate of authority to an applicant such as MIEAC, the Commission must determine that the present or future public convenience requires or will require it. Minn. Stat. § 237.16, subd. 4 (1990).

The scope of MIEAC's proposal and the novelty of many issues raised by MIEAC's application demanded careful scrutiny and required the investment of substantial amounts of time and work by the Commission, the Department and the Office of Administrative Hearings.

Department Assesses MIEAC to Recover Regulatory Expenses

Minn. Stat. § 237.295, subd. 1 (1990) prescribes the recovery of expenses incurred by the Commission and the Department during their investigation of an application for authority to provide telephone service. According to the statute, the Department sends the telephone company who has occasioned the investigation a bill to recover not only its own expenses but those incurred by the Commission. According to statute, amounts billed to the Commission by the OAH for the contested case hearing regarding the application must be billed to the applicant company by either the Commission or the Department. Minn. Stat. § 237.295, subd. 5 (1990). In practice, the Commission bills the company for these expenses.

To date, the Department has billed MIEAC a total of \$366,830 and the Commission has billed MIEAC \$94,632.03 for OAH costs. Of the \$460,914.50 billed, MIEAC has paid \$85,680.07.

MIEAC Requests Relief From Assessment

In its request for relief, MIEAC conceded that the Department and the Commission actually performed the work billed and that this work was necessary. Nevertheless, MIEAC asserted that it was entitled to relief from these billings for two reasons.

1. The Exception to Subd. 1's Limitation on Assessment

First, according to MIEAC, Subdivision 1 of Minn. Stat. § 237.295 (1990) prohibits the Commission from charging a company investigation costs in excess of two-fifths of one percent of the gross jurisdictional operating revenue of the company in the preceding calendar year. Applying this limitation to MIEAC, MIEAC's maximum annual charge would be \$19,478.

MIEAC acknowledges that a further provision of Subdivision 1 provides an exception to the limitation. The provision in question authorizes the Commission to assess costs of investigation without regard to the cited limitation until the telephone company has reported its gross jurisdictional operating revenue for the preceding calendar year for the first time. MIEAC argued that this exception to the previously stated limitation is not applicable to MIEAC because, according to MIEAC, proceedings such as those involved in this docket were not contemplated by the legislature when it adopted the exception.

The language of the exception is plain and contains no ambiguity. The Commission will not speculate, as requested by MIEAC, that the legislature intended certain types of proceedings to be excluded from the exception to the limitation. There is no basis in the statutory language for doing so.

2. Relief From "Excessive" Assessment

MIEAC argues that the Commission should exercise its discretion under Subdivision 3 of the statute to relieve MIEAC of the assessment because the assessment is "excessive". Minn. Stat. § 237.295, subd. 3 (1990). According to MIEAC the assessment is excessive for two basic reasons.

a. Argument That Assessment Defeats Statute's Purpose

MIEAC first argues that the assessment is excessive because application of the exception to the limitation would not serve what MIEAC construes to be the exception's sole purpose. According to MIEAC, the legislature adopted the exception solely to avoid a practical problem that the Department faced in determining the precise regulatory cost limits for new companies before its revenues were determined. In this case, the exception is not needed to assist the Department because MIEAC's first year operating revenues have been determined. In such circumstances, the statutory limit on MIEAC's costs can be calculated and it would be improper to invoke the exception to overcome the statute's clear intention to limit the amount that any one telephone company may be charged for investigations.

Previously in this Order, the Commission rejected MIEAC's argument that Subd. 1 required adherence to the limitation. Likewise in this context, the Commission does not accept MIEAC's view that the sole purpose of the exception is to address an administrative difficulty for the Department in determining precise regulatory cost limits for new companies before revenues are determined. The plain wording of the statute does not support MIEAC's view. The exception appears to authorize recovering from new entrants the cost of their entry into Minnesota as a regulated industry.

b. Argument That Assessment is a Barrier to Market Entry

Second, MIEAC argues that the assessment is excessive because it presents a significant barrier to market entry due to MIEAC's small size and the fact that the capped rate formula adopted for MIEAC's services in the Commission's January 10, 1990 Order did not contemplate these high regulatory costs.

The Commission does not find MIEAC's barrier-to-entry argument convincing. MIEAC had the opportunity, as do all market entrants, to request that their rates be set to recover regulatory costs. The Commission traditionally allows such costs to be recovered in rates. When amortized over the typical 15 year period, substantial regulatory costs can be absorbed with slight impact upon rates. For example, in this case, assuming that none of the regulatory costs currently projected by MIEAC (\$650,000) were included in calculating the cap rate of .99 cents, MIEAC's start-up expenses amortized for the usual 15 year period would increase by \$43,333. The \$43,333 divided by MIEAC's estimated minutes of use equals only .008 cents ($\$43,333 / 515,154,001 = .00008$ or .008 cents. It is clear that the addition (.008 cents) to the current cap (.99 cents per minute of use) would be relatively insignificant and constitute no market barrier whatsoever.

Moreover, it appears that MIEAC actually did calculate its capped rate to recover a substantial amount of regulatory costs. The testimony of MIEAC's witness Roger D. Musick in the contested case hearing was that MIEAC's projected budget included \$1.5 million in "start-up expenses." MIEAC has never stated exactly what part of the \$1.5 million was to cover regulatory costs, but its witness indicated that regulatory expenses accounted for a major part of that figure. See Transcript Volume 31 of OAH Hearing before Judge Bruce Campbell, January 24, 1990, p. 14, lines 3-7.

MIEAC continued to advocate that capped rate long after receiving bills from the Department that clearly indicated the extent of

the regulatory costs for which it would be billed.¹ The fact that MIEAC did not alter its capped rate proposal despite on-going receipt of substantial bills for regulatory costs strongly suggests that the costs it was being billed were in line with its budget for these costs. However, even if MIEAC did fail to accurately project the regulatory costs in calculating its capped rate, the Commission is unconvinced that the burden of making up for that error should be borne by Minnesota taxpayers, as MIEAC suggests.

3. Argument That Assessing All Costs to MIEAC is Inappropriate

Third, MIEAC argued that the regulatory costs related to issues of general IXC interest and to USWC's centralized equal access proposal should be assessed against the interested parties, not against MIEAC.

a. Consideration of USWC's CEA Option

During the contested case proceeding, USWC described an alternative CEA service that it indicated it was willing and able to deploy. MIEAC conceded that regulatory time devoted to comparing USWC's CEA option with MIEAC's system was relevant in determining whether MIEAC's proposal was in the public interest. Nevertheless, according to MIEAC, USWC should be charged the cost of the regulatory time thus expended because USWC's CEA was a separate and distinct service offering which, if approved by the Commission, would have operated in place of or in competition with MIEAC's service.

MIEAC mischaracterizes USWC's CEA option as a proposed service offering. In fact, USWC never filed a proposed CEA service with the Commission for approval. Review of its CEA option was strictly for purposes of illuminating the comparative value of MIEAC's system.

b. Issues of General IXC Interest

MIEAC asserted that the Commission must reallocate the time devoted to industry and other USWC specific issues to prevent the costs to MIEAC from being excessive.

The Commission does not agree that the issues referred to by MIEAC are properly characterized as industry issues or USWC specific issues. Despite the consideration of issues that

¹ For example, prior to advocating its .99 cents per minute of use capped rate proposal in hearings before the Commission on October 31 and November 1, 1990, MIEAC had received bills for \$252,365.85 that clearly indicated the kinds of regulatory expenses for which MIEAC was being billed.

involved numerous affected parties, the Commission is convinced that no issues were considered that were not required to be addressed as part of MIEAC's application.

For example, the ballot participation issues decided in the course of this matter² focused on the rights and obligations of parties other than MIEAC, but did so strictly in response to and in the context of MIEAC's application. In its application, MIEAC requested approval for a system that would preserve the existing toll service choices available to PILEC subscribers. MIEAC indicated that a "principal purpose" of its application was to promote "the opportunity to continue to receive [toll services] from their current toll providers, typically AT&T and [USWC], respectively". MIEAC Application at p.13. During this proceeding and consistent with this articulated "purpose of the Application," MIEAC requested that the Commission require AT&T (the dominant IXC that currently provided 1+ interLATA toll service to the PILECs) and USWC (the dominant IXC that currently provided 1+ intraLATA toll service to the PILECs) to continue to serve ILECs that would choose to participate in the MIEAC system. MIEAC also requested that the Commission require AT&T and USWC to appear on the MIEAC ballots used by PILEC subscribers to select their IXC carriers of choice as part of the MIEAC system.

This began as an applicant proceeding and remained an applicant proceeding, both in form and practice. None of the Commission dockets cited by MIEAC to support the propriety of allocating costs to parties other than applicants involved applicant proceedings. This docket has been clearly marked NA for "new authority" from its inception. During the contested case proceeding, the Department and the RUD-OAG requested that the proceeding become generic in scope and include industry wide issues. The ALJ denied these requests and referred the matter to the Commission for review. The Commission affirmed the ALJ's decision. In its February 12, 1990 ORDER AFFIRMING ADMINISTRATIVE LAW JUDGE'S RULINGS ON CERTIFIED MOTIONS, the Commission stated:

The Commission agrees with the Administrative Law Judge that this proceeding should focus on MIEAC's application and should not attempt to resolve far-reaching policy issues regarding the provision of equal access in Minnesota. This was the Commission's original intention and is still the most workable and equitable approach.

² These issues were considered and decided in the Commission's ORDER REQUIRING U S WEST COMMUNICATIONS, INC. TO APPEAR ON CUSTOMER BALLOTS, REQUIRING PRIOR AUTHORIZATION BEFORE DISCONTINUANCE OF TOLL SERVICE, AND ESTABLISHING A SCHEDULE FOR FURTHER FILINGS (March 13, 1991).

As noted earlier, MIEAC's application promised to reconfigure the telecommunications network for a large part of Minnesota. As such, its proposal affected many parties. There is no question that the issues and concerns brought to the analysis of MIEAC's system by these parties were occasioned by MIEAC's application and formed an essential part of the Commission's evaluation. In short, the substantial participation in the process by affected parties was reasonable, foreseeable, and helpful.

SUMMARY

In light of these considerations, the Commission finds it appropriate that MIEAC be assessed the regulatory costs related to its application. MIEAC's request for relief from these assessments will be denied.

ORDER

1. The petition of the Minnesota Independent Equal Access Corporation (MIEAC) for relief from billings issued by the Department of Public Service (the Department) to recover the costs of this proceeding is denied.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Richard R. Lancaster
Executive Secretary

(S E A L)